IN THE

Supreme Court of the United States,

OCTOBER TERM, 1909.

IN THE MATTER

OF

The Application of METROPOLITAN TRUST COMPANY of the City of New York for a Writ of Prohibition, or, in the alternative, for a Writ of Mandamus directed to the Honorable HENRY G. WARD, Circuit Judge of the United States for the Second Circuit and for the Southern District of New York, and directed to the CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Supplemental Brief To Be Filed with Permission of the Court on the Oral Argument Ordered on the Application under Rule Granted April 25, 1910.

In addition to the argument and citations made in the brief filed in support of this application under the rule granted by the Court April 25th,

1910, counsel begs leave to submit the following supplemental brief.

It is respectfully submitted that the error of the learned Judge below was in assuming that the decree he vacated was *void*, and that the decision of the Circuit Court of Appeals so established, said Judge saying in his opinion it would be "an absurdity" to allow a *nullity* to stand and regulate the rights of the parties. The decree vacated was *not* void or a nullity, but as valid and binding as *any* judgment ever was or could be, and the Circuit Court of Appeals *did not decide and had no jurisdiction to decide anything* to the contrary, since at plaintiff's own election the petitioner and its said decree were not before said Court of Appeals. It is, therefore, no more absurd that said decree should stand and regulate the rights of the parties than that any other unreversed and unappealed-from judgment should stand and regulate the rights of a party who has had his opportunity to appeal and elected not to do so.

If this be no longer so, then the courts have lost their function, since their judgments will never really settle anything if a judgment may be vacated at *any* time and for *any* reason.

The remainder of this supplemental brief will be devoted to what are conceived to be the underlying errors and unjustified assumptions in the brief filed by the learned counsel on the other side.

On page 4 of Mr. Hodge's brief appears the following paragraph:

> "This order" (that is the order of Judge Lacombe denying the motion to remand the case) "was made, notwithstanding that (as is held in *Campbell* vs. *Millikin*, 119 Fed., 981) a stockholder, suing on behalf of a corporation, has no controversy with the corporation—much less a separable one."

The cause of action asserted by Pollitz, the plaintiff in the suit, in which was rendered the decree vacated by Judge Ward's order, was certainly not a cause of action *on behalf* of the corporation The Wabash Railroad Company. The fundamental purpose of that action was to declare invalid certain acts of that corporation itself alleged to have been performed by the corporation in excess of its powers which acts, it was alleged, were resulting in the issue of illegal and void bonds and shares of stock.

This cause of action was not a derivative cause of action asserted by Pollitz, in behalf of the Railroad Company, because that company would not bring the action itself, but a cause of action asserted directly by Pollitz himself in his own behalf as a stockholder in the company, to prevent the alleged impairment of the value of his stock by the issue of further stock and bonds. This cause of action was wholly between the plaintiff Pollitz on the one hand, and against the Railroad Company on the other, and if any such cause of action in favor of Pollitz existed at all, it existed in his favor directly *against* the Railroad Company, and arose out of the acts performed by the Company in alleged violation of Pollitz's contract of membership in that company. Obviously such a cause of action could not have been asserted by the Railroad Company against itself.

This was the first and primary and fundamental cause of action asserted by the bill, and there was also asserted a second, or what might be called an alternative, cause of action, in which it was sought, if the Court refused to declare the new securities void, that various individual defendants, some of whom were officers and directors of the road and others who were not, should be held in damages *to be paid to Railroad Company.* This second cause of action consequently was derivative from, and for

the benefit of the Railroad Company. The first cause of action was predicated upon the theory that the new bonds and stock were void, and the second cause of action upon the contradictory theory that they were not void, but issued without sufficient consideration *to* the Railroad. In the first cause of action Pollitz was the real as well as the nominal plaintiff, while in the second cause of action the Railroad Company was the true plaintiff. In passing, it may be noticed that one of the grounds of petitioner's demurrer was that the bill was multifarious, as stating two fundamentally distinct causes of action in which the real plaintiffs were not even the same.

It is not assumed that the Court will on this application go into the question of whether or no Judge Lacombe was right or wrong in refusing to remand the case. This Court refused to do so when Pollitz sought a mandamus to compel Judge Lacombe to remand (*In re* Pollitz, 206 U. S., 323). It is sufficient for the purposes of this application to point out, as this Court did *in re* Pollitz *supra,* that the suit, having been removed on the ground that a separable controversy existed, it was the province and duty of the Circuit Court, and of the Circuit Court alone, to determine whether such a separable controversy did exist. Judge Lacombe having determined that a separable controversy did exist, and in pursuance of that determination the decree dismissing the suit as to the Trust Company having been entered, and that determination and said decree never having, *as to the Trust Company,* been reviewed by any appeal *binding on said Trust Company,* the question of whether or no a separable controversy did exist has been finally settled, at least so far as the Trust Company is concerned. *Consequently the decree of January 10, 1908, was not "void" or a nullity and cannot be collaterally attacked.*

At the top of page 5 of said brief it is said:

> "Since no appeal could be taken from the order denying the motion to remand, the complainant in March, 1907, applied to this Court for a writ of mandamus, and such proceedings were had as resulted in a denial of the writ and the delivery of an opinion which is reported *in re* POLLITZ, 206 U. S., 323."

While it is true that no appeal could have been taken *directly* from Judge Lacombe's order denying the motion to remand, the plaintiff could have reviewed *as to petitioner* the order refusing to remand by an appeal from the decree of January 10, 1908, dismissing the Trust Company from the suit. The question whether such appeal could have been taken immediately upon the rendering of said decree or only after the decree dismissing the suit on the merits as to all the other defendants, which was rendered on February 23, 1909, is immaterial. In any event the complainant had the opportunity to review as to the Metropolitan Trust Company the correctness of the order denying the motion to remand. He has elected not to review such order as to the Metropolitan Trust Company, and consequently cannot here complain of that decision or claim it was incorrect.

On page 5 of said brief it is said:

> "An order was thereupon rendered January 10, 1908, sustaining the demurrer of the petitioner and allowing the other defendants to answer. This is the order which is constantly referred to in the petitioner's papers and on the brief of its counsel as a 'final order.'
>
> "No appeal could be taken from this order, if we are right in our contention that it was not a final decision."

It is wholly immaterial whether the decree of January 10, 1908, was final and appealable when entered since in any event it became final and appealable when the decree dismissing the suit as to all the remaining defendants was entered on February 23, 1909, and plaintiff then at least had the opportunity to appeal. He elected not to do so and did not make the motion to vacate said decree until ~~May 15~~ March 31, 1910, more than two years after the entry of the decree he desired to vacate and more than one year after the entry of the decree dismissing the suit as to all the remaining defendants.

On page 6 of said brief it is stated:

> "The cause is now pending in the state court."

The cause is *not* "now pending" in the State Court at least *as to the Metropolitan Trust Company*. It is to prevent such a result that this application is made. Furthermore, the order entered on the mandate of the Circuit Court of Appeals expressly excluded the Metropolitan Trust Company from the operation of the order remanding the case to the State Court.

On the top of page 7 of said brief, it is said:

> "Judge Ray should have remanded the whole cause in accordance with the mandate of the Circuit Court of Appeals, and hence application should be made now to him to do what he should have done then."

Judge Ray did not and should not, under said mandate, have remanded to the State Court the whole cause, that is, the cause including the Metropolitan Trust Company as well as the other defendants. The Metropolitan Trust Company and its decree of January 10th, 1908, were in no way before the Circuit Court of Appeals or subject to

its jurisdiction, and the Circuit Court of Appeals did not order, *and had no jurisdiction to order*, that the cause *as to the Metropolitan Trust Company* should be remanded to the State Court.

On the top of page 8 of said brief it is said:

> "It would seem that the important proposition . . . is whether the Circuit Court retained sufficient jurisdiction over the cause of Pollitz *vs.* The Wabash Railroad Company and others, . . . to set aside an order entered at a preceding term which sustained a demurrer as to one of the defendants, the motion being made at the same term wherein an order had been entered, in accordance with the mandate of the Circuit Court of Appeals, remanding the cause to the state court (as to all the necessary defendants) on the ground, that such diverse citizenship did not exist as to give the federal courts jurisdiction to take any proceedings, or to render any decrees in this cause."

The question here is not whether the Circuit Court had any power to enter any order during the term at which was rendered *the decision of the Circuit Court of Appeals*, because the Metropolitan Trust Company was not before the Circuit Court *of Appeals* when it made its decision, but whether the Circuit Court had any jurisdiction to vacate the decree of January 10th, 1908, after the expiration of the term at which that decree was rendered, *as well as after the expiration of the term at which was rendered the decree dismissing the suit as to all the other defendants.*

On page 9 of said brief it is said:

> "But if it" (that is the decree of January 10th, 1908, dismissing the suit as to the Metropolitan Trust Company) "was not a final decree, and if no appeal could be taken from it, then necessarily the entire argument of the petitioner falls to the ground."

This reasoning is not comprehended by counsel for the petitioner. The petitioner's position is that the decree of January 10th, 1908, either was a final decree when rendered, or at least, became final when the decree dismissing the suit as to all the remaining defendants was entered. In either event the plaintiff had his opportunity to review petitioner's decree on appeal and elected not to do so.

At page 9 of said brief it is further said:

> "Whereas, if the decree" (that is of January 10th, 1908) "was a final one, from which an appeal could be taken, then it is incumbent upon us to show, as we believe we can, that the motion below was an exception to the rule that a motion to set aside a judgment must be made at the term during which the judgment was entered. In other words, that it was in effect a motion in the nature of the ancient writ of *coram vobis*, or, as it was called in English, *coram nobis*."

The writ of *coram vobis* was a writ used to correct certain errors in *actions at law*, which corrections can now be made by motion. It is well settled that in no case was said writ ever issued to correct "an error in the judgment itself." (See cases cited in main brief, Point I.)

The rule is recognized by all the cases, even by the very case particularly relied upon by Mr. Hodge himself, and cited at a number of places in his brief, to wit, the case of SHUFORD *v.* CAIN, 1 Abbott's U. S. Reports, 302, where, at page 306 thereof, it is said:

> "A rule is that the same court which pronounced and entered up final judgment cannot at a subsequent term vacate it *for errors* in law; this is the doctrine of the common law and also of the Supreme Court of the United States. Some of the exceptions to the rule are where the judgment was irregu-

> lar or where no notice had been served upon the defendant or for fraud or misprison of the clerk."

In the Shuford case judgment had been entered *by default* by an assignee of a promissory note, of which the maker and payee were citizens of the same State, and it was held that as the payee could not have sued the maker, his assignee, who was a citizen of a different State, was in no better position under Section 11 of the Judiciary Act of September 24th, 1789, then in force.

The case is not an authority against the position of the petitioner, and if it were, it would be of but slight assistance to Mr. Pollitz, since it would be in direct conflict with many decisions of this Court. In the case of BRONSON *v.* SCHULTEN, 104 U. S., 410, this Court said, page 416:

> "It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis* found in the reported cases in this country, and as defined in the case of this court above mentioned, and in England, that it does not reach to the facts submitted to a jury, or found by a referee, *or by the court sitting to try the issues.*"

See also cases cited on petitioner's main brief under Point I.

Of course the question of whether the suit was properly removed to the Circuit Court was the fundamental question at issue before there could be entered the decree dismissing, with costs, the suit as to the Metropolitan Trust Company. That question had been determined adversely to Pollitz and in favor of the removability of the suit. Even, therefore, were the action one at law, in which the writ of *coram vobis* could formerly have been allowed, and whose office could now be performed by motion, the decree of January 10th, 1908, was

not properly vacated since the alleged error was "in the judgment itself."

In equity, after term time, there is in certain cases a remedy by bill of review. But even in equity a bill of review would not lie to correct the alleged error here complained of, and, in any event, a bill of review must, with certain exceptions, which would have no application here, be brought before the time to appeal expires.

TRUST CO. *v.* GRANT LOCOMOTIVE WORKS, 135 U. S., 207.

MR. HODGE assumes that petitioner admits that the Circuit Court of course had power in some way or other to vacate the decree of January 10th, 1908, and that the petitioner is merely objecting to the form of the remedy. See Mr. Hodge's brief, at bottom of page 22, where it is erroneously said: "It is urged by petitioner that our only remedy is to bring a bill in equity. This is circuitous, unnecessary, expensive." Petitioner has never urged anything of the sort. Mr. Hodge entirely misapprehends petitioner's attitude.

The petitioner's position is: The Circuit Court, in the exercise of its proper jurisdiction, determined that a separable controversy existed; that determination has never been reversed as to the Metropolitan Trust Company; the Circuit Court also determined that the Metropolitan Trust Company was entitled to be finally dismissed from the suit, with costs, and the decree of January 10th, 1908, finally dismissing the Metropolitan Trust Company from the suit, with costs, was entered in pursuance of such determinations; the plaintiff had the opportunity to appeal from that decree and to review *as to petitioner* the correctness of the determination that a separable controversy existed by assigning as error on such appeal the refusal to

remand and plaintiff elected not to do so; that consequently the Metropolitan Trust Company's rights under its said decree are *res adjudicata* and constitute property rights, of which it could not after term time be deprived except by appeal.

It follows that the decree of January 10, 1908, cannot now be vacated by writ of *coram vobis*, motion or bill of review, because the fancied error goes to the very issue that the Circuit Court had jurisdiction to determine and did determine in favor of petitioner.

At page 9 of said brief it is further said:

> "The second cardinal error which permeates the entire brief of the petitioning defendant is that it was a necessary party to the action."

This is not the petitioner's claim. On the contrary, the ground of removal was that petitioner was not a necessary party and that the controversy was really between the plaintiff and the Wabash Railroad Company, and consequently that the action was removable. Furthermore, the Metropolitan Trust Company demurred to the complaint on various grounds, among others on the ground that the bill was as to the Metropolitan Trust Company wholly without equity, which demurrer was sustained.

Mr. Hodge says the plaintiff has never contended that the Metropolitan Trust Company was a necessary party. Then why was said Trust Company originally made a party to the bill and why does the plaintiff now seek to bring the Trust Company back into court and to have the case as to it remanded to the state court and said Trust Company subjected to further wholly useless and unnecessary litigation and expense?

Just what is intended by this argument made by counsel, it is difficult to comprehend unless it be to

suggest without actually asserting that because the Metropolitan Trust Company was not a necessary party to the original bill, it was not a necessary party to the appeal to the Circuit Court of Appeals. Whether the appeal to the Circuit Court of Appeals was of *any* force or effect because the Metropolitan Trust Company was omitted therefrom, it is not necessary to here argue. But certainly it cannot be successfully contended that the decision of the Circuit Court of Appeals on the appeal to which the Trust Company was not a party, could in any way affect its rights under its judgment which was not appealed from. Therefore, whether or no the Circuit Court of Appeals had on the so-called appeal jurisdiction to review *as to the other defendants* the question of whether or no the suit was properly removed, the said Circuit Court of Appeals certainly had no jurisdiction to review the question of removability *as to the Metropolitan Trust Company.* Consequently, if on this application it is sought to attribute any force or effect to the decision of the Circuit Court of Appeals, the conclusive answer to any such argument is that the Metropolitan Trust Company *was a necessary party to such appeal,* even if the Trust Company was not a necessary party to the cause of action stated in the bill of complaint.

On page 10 of said brief it is said:

> "The third cardinal error which we find upon the petitioner's brief, is the false assumption that it is impossible to bring a party into court subsequent to a term, wherein a void or invalid judgment is entered, by a notice of motion."

The petitioner does not assume anything of the sort. No such question arises in this application. There is no question here of vacating a *void* or invalid judgment. The decree of January 10th, 1908,

was not void or invalid. The Circuit Court, and the Circuit Court alone, had jurisdiction to determine the question of whether a separable controversy existed. Having determined that question in favor of removability, the decree of January 10th, 1908, entered in pursuance of such determination was final and conclusive, unless reviewed on appeal. *There is no authority for asserting that the decree was void.* This Court has held to the contrary time and time again. The leading cases are referred to in Point II of petitioner's main brief, and none of the cases cited by the learned Circuit Judge below in his opinion on vacating said decree or by Mr. Hodge in his brief is authority to the contrary.

On page 12 of said brief it is said in the head note of Point II:

> "The writ of mandamus cannot be used to compel the Circuit Court, to take jurisdiction of a cause, which it has decided, through its Court of Appeals, it has no jurisdiction to consider, owing to a failure to show diverse citizenship, between the necessary parties."

A writ of mandamus is not asked to compel the Circuit Court *to take* jurisdiction, but on the contrary it is asked to compel the Circuit Court *to cease* taking jurisdiction and to vacate an order which it has made in the exercise of a jurisdiction which it should never have assumed. Furthermore, it has *not* been decided through the Circuit Court of Appeals, at least *as to the Metropolian Trust Company*, that the Circuit Court had no jurisdiction to consider the cause.

On page 12 of said brief it is further said:

> "A court has the right *ex mero motu* to refuse to consider a cause over which it has no jurisdiction, and similarly to vacate what

> it may have done in a cause over which it has no jurisdiction."

As already pointed out, there is no such question in this case.

On page 12 of said brief it is further said:

> "*Its* decision that there is not that diverse citizenship which gives it jurisdiction is final and will not be reviewed by this Court."

"Its" being evidently intended to refer to the Circuit Court. The Circuit Court has made no such determination and this Court is not asked to review any such determination.

It is further said on page 12 of said brief:

> "The conclusion of the Circuit Court that the cause should be remanded is not reviewable here by appeal or writ of error or by mandamus."

The petitioner is not seeking to review here any conclusion of the Circuit Court that the cause should be remanded and the Circuit Court has not determined as to the petitioner that the case should be remanded.

On pages 12 and 13 of said brief it is said:

> "A motion in the nature of a writ of error *coram vobis* 'is the exercise of jurisdiction in the court below which does not admit of revision in this tribunal.' . . . The petitioner is also endeavoring to make the writ of mandamus perform the office of a writ of error. This Court has emphatically held that this cannot be done 'even if no appeal or writ of error is given by law.'"

The present application for a mandamus does not seek to revise a writ of error *coram vobis.* The *mandamus is asked to restrain the Circuit Court within its jurisdiction in a case where the petitioner would otherwise be subjected, at great expense, to*

further litigation which would come to naught, and for which it would have no adequate remedy and in a case where the lack of jurisdiction of the Circuit Court to make the order complained of plainly appears on the face of the record as a matter of law.

The decisions of this court *uniformly* sustain the right to mandamus under these circumstances. The cases are referred to in Point IV of petitioner's main brief. See also the recent case of *In re* Cleland, 218 U. S., 120, Opinion, Mr. Justice Holmes. None of the cases cited by Mr. Hodge are authorities to the contrary.

As already pointed out, the argument made in Point III of Mr. Hodge's brief has no bearing on the questions here at issue; the decree of January 10th, 1908, was either final and appealable when entered or became such when the decree of February 23rd, 1909, dismissing the suit as to all the remaining defendants was entered; and the terms at which both decrees were entered expired long before the motion to vacate the decree of January 10th, 1908, was made.

On page 15 of said brief a quotation is given apparently as being an extract from the brief of the petitioner's counsel. It is immaterial, but the extract is not from any brief of counsel for the petitioner.

As the remaining arguments in Mr. Hodge's brief which petitioner would wish to answer are mainly repetitions of matters that have already been criticized, it is sufficient only to mention the following:

On page 17 it is said in the head note of Point VI., that

> "no error was committed . . . in granting complainant's motion to vacate that order, or decree" (decree of January 10th,

> 1908) "on the suggestion, or motion of complainant, in view of the mandate of the Circuit Court of Appeals, *establishing the fact, that the diverse citizenship did not exist,* which was necessary to give jurisdiction to the Court to enter the decree."

Of course, the mandate of the Circuit Court of Appeals did not and could not establish the fact *as to the Metropolitan Trust Company* that diverse citizenship did not exist, since the Metropolitan Trust Company was not a party to the appeal on which that mandate was issued and the order entered on said mandate expressly excepted the petitioner from the operation of the direction remanding the cause.

At the bottom of page 17 of said brief, it is said, that Judge Ward recognized the rule that a judgment cannot be vacated after the expiration of the term; and it is further said, "But the exceptions to this rule are many. They include a judgment or order which is not final."

Of course, a judgment which is not final can be vacated until the expiration of the term at which *final judgment* is entered, because until the expiration of the term at which final judgment or decree is entered the parties are in court. The point here, however, as already said, is that the decree of January 10th, 1908, was either final when entered or became such on February 23rd, 1909, when the decree dismissing the suit as to all the other defendants was entered and the motion to vacate the decree of January 10th, 1908, was not made until long after the expiration of the terms at which both of said decrees were entered.

On page 18 of said brief there are further arguments concerning void judgments, which arguments for the reasons already stated have no application here.

Toward the bottom of page 19 of said brief, further erroneous reference is made to the effect of the decision of the Circuit Court of Appeals, counsel saying:

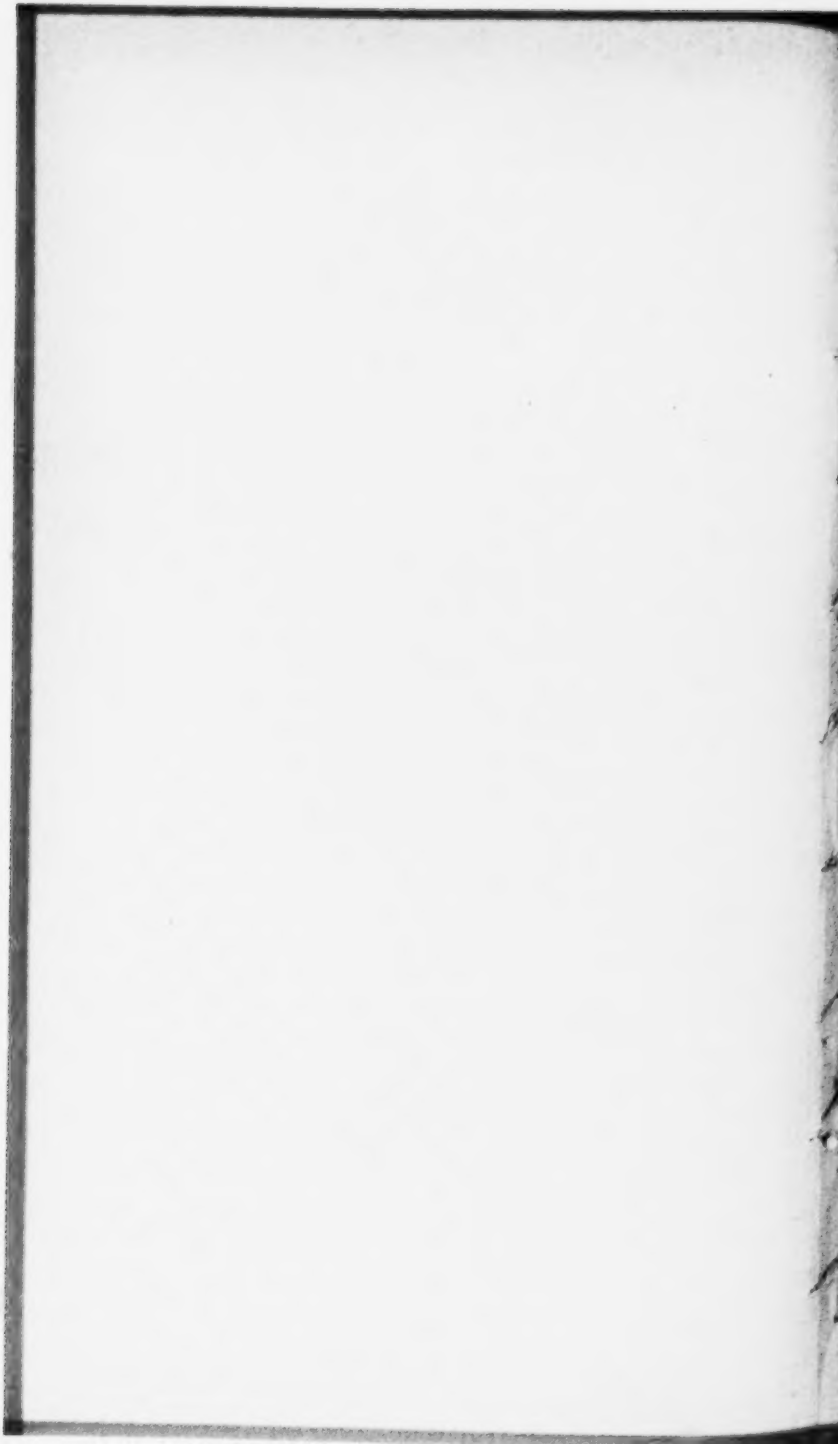
> "In the case at bar the lack of jurisdiction of the cause has been passed upon and finally decided by the Circuit Court of Appeals."

Of course, the Circuit Court of Appeals has not and could not have decided or passed upon anything *as to the petitioner.*

At the bottom of page 19 and top of page 20, the case of *in re Hohorst*, 150 U. S., 653, is referred to. The point of the Hohorst case was that the cause of action against the defendants was *joint.* One of the defendants was dismissed and the action continued against the other, and final judgment against the latter had never been entered; under these circumstances both defendants were still subject to the jurisdiction of the court, and the appeal that was taken from the decree dismissing the one defendant was premature. The fact that the defendant who had been dismissed appeared specially to dispute the jurisdiction of the Court over him availed him nothing, since it was perfectly clear he was still in court and subject to the jurisdiction of the Court, final judgment on a *joint* liability not having been entered.

It is respectfully submitted that the rule granted by this Court April 25, 1910, should be made absolute.

TOMPKINS MCILVAINE,
Of counsel for Petitioner.



No. 12 Orig.

Supreme Court of the United States

October Term—1909

IN THE MATTER

of

The Application of THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK for a Writ of Prohibition or Mandamus against the HONORABLE HENRY G. WARD, Circuit Judge of the United States for the Second Circuit, and against THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Return of Henry G. Ward, Circuit Judge of the United States for the Second Circuit and of the Circuit Court of the United States for the Southern District of New York.

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Supreme Court of the United States

In the Matter

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The Application of The Metropolitan Trust Company of the City of New York for a writ of Prohibition or Mandamus against the Honorable Henry G. Ward, Circuit Judge of the United States for the Second Circuit, and against The Circuit Court of the United States for the Southern District of New York.

Return of Henry G. Ward, Circuit Judge of the United States for the Second Circuit and of the Circuit Court of the United States for the Southern District of New York.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

In compliance with the order to show cause issued by your Honorable Court on the 25th day of April and served on the 28th day of April, 1910, the above named respondents do respectfully represent that:

The reasons for the action of the Court in vacating the judgment which dismissed the bill of complaint in the original cause as against the defendant The Metropolitan Trust Company of the City of New York, are fully set forth in the opinion of the undersigned taken in connection with the opinion of the Circuit Court of Appeals and the other proceedings annexed to the order to show cause, all of which are returned herewith.

J. Aspinwall Hodge, of counsel for the complainant in the original cause having desired to be heard is designated to present this return and file such brief and make such argument as may be permitted on the order to show cause.

April 28, 1910.

HENRY G. WARD,
United States Circuit Judge.

No. 12 Orig.

[redacted]

Supreme Court of the United States

October Term—1909

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The Application of THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK for a Writ of Prohibition or Mandamus against the HONORABLE HENRY G. WARD, Circuit Judge of the United States for the Second Circuit, and against THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of Mr. Hodge in Opposition to Application for a Writ of Prohibition or Mandamus

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The Application of the METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK for a Writ of Prohibition or Mandamus against the HONORABLE HENRY G. WARD, Circuit Judge of the United States for the Second Circuit, and against THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of Mr. Hodge in opposition to the application for the issue of a writ of prohibition, or mandamus, prohibiting the Circuit Court from exercising jurisdiction over the Metropolitan Trust Company in a pending cause, or over a certain decree entered January 10, 1910, or, in the alternative, commanding the Circuit Court to annul an order entered April 25, 1910, vacating the said decree.

This is a hearing upon the return of a rule directing Judge WARD of the Second Circuit to

show cause, why a writ of prohibition, or mandamus, should not issue, prohibiting him from assuming or exercising any jurisdiction over the petitioner, the Metropolitan Trust Company, a defendant in a certain pending cause entitled *James Pollitz vs. The Wabash Railroad and others,* or over a decree in that cause, dated January 10, 1908, or, in the alternative, commanding the said judge "to annul, and set aside, any order that may be entered" vacating said decree. See rule entered April 25, 1910, fol. 235, also fols. 26 and 27.

For the convenience of the court we print an index of the exhibits which are a part of the record, giving them in chronological order.

Statement of the Case.

The action of *Pollitz vs. Wabash Railroad* and others, including the Metropolitan Trust Company of the City of New York, the petitioning defendant, was begun January 15, 1907, in the Supreme Court of New York, by the complainant, a stockholder of the defendant railroad company (fol. 5), on behalf of the company, and his fellow stockholders.

The bill sought to set aside and enjoin the performance of an unlawful agreement prejudicial to the stockholders (fol. 96 et seq.).

The complainant, and nearly all the defendants, including the petitioning defendant, are citizens of New York (fols. 39 and 40).

The defendant Wabash Railroad Company is a consolidated corporation created under the laws of Missouri, Ohio, Indiana, Michigan and Illinois (fol. 37).

The defendants may be divided into two classes:

FIRST, the defendant railway company, the leading defendant (at least in the sense of being first named), and a number of individuals and corporate defendants, including the directors of the railway company, all of whom are charged with confederating and acting with the defendant corporation to carry out the illegal agreement, *ultra vires* of the company, for their own benefit, and to the prejudice of the company, the complainant, and all the other stockholders (fols. 63 et seq., 96 and 201). As against them the bill prays, that certain illegal securities issued at their instigation, and to some of them, be returned to the treasury of the company, or that they make good to the company, the value of such securities, whoever may be the present holders.

The SECOND class of defendants consists of such as had no part in the conspiracy. It consists of but one defendant, to-wit, the Metropolitan Trust Company, the petitioner here. It is charged only with being the purchaser of certain of the new and illegal bonds, and it is expressly alleged that it does not belong to the first class of defendants (fol. 96).

Against it, affirmative relief is prayed for, to-wit, that it be ordered to return to the defendant Wabash Railroad Company all of the bonds received by it, or, in default of such return, pay into the treasury of the company on whose behalf the complainant sues, the amount that is due in the premises (fols. 102, 103 and 191).

The case was removed, by the Wabash Railroad Company, to the United States Circuit Court, in January, 1907, on the ground that a separable controversy existed between the complainant, a citizen of New York, and the defendant railroad company, a citizen of several other states, but not of New York (fol. 8).

In February, 1907, Judge Lacombe granted an order, denying a motion to remand the cause to the state court (fols. 9 and 130 *et seq.*).

This order was made, notwithstanding that (as is held in *Campbell vs. Milliken*, 119 Fed., 981) a stockholder, suing on behalf of a corporation, has no controversy with the corporation—much less a separable one.

The cause was, at the same time, consolidated with another, and earlier, cause between the same complainant, and certain of the same defendants (fol. 15), but not including the Metropolitan Trust Company (fols. 15 and 16), and an order entered denying a motion of the complainant to dismiss the first cause (fols. 171, 174).

Since no appeal could be taken from the order denying the motion to remand, the complainant, in March, 1907, applied to this court for a writ of mandamus, and such proceedings were had as resulted in a denial of the writ and the delivery of an opinion which is reported *in re Pollitz*, 206 U. S., 323.

Thereafter all the defendants, who had been served, demurred, and all the dumerrers were overruled except that of the petitioning Trust Company (fol. 14).

The ground of sustaining the demurrer is not clear, and we do not believe is material.

An order was thereupon rendered January 10, 1908, sustaining the demurrer of the petitioner and allowing the other defendants to answer. (See decree, fols. 145 *et seq.*) This is the order which is constantly referred to in the petitioner's papers and on the brief of its counsel as a "final decree."

No appeal could be taken from this order, if we are right in our contention that it was not a final decision (Point III, *infra*); but whether interlocutory or final, no appeal was taken.

Answers were then filed by the other defendants under the leave granted by the decree, and after proofs were taken, and a hearing had before Judge RAY, a final judgment was entered February 23rd, 1909, dismissing the bill and granting certain affirmative relief asked for by the defendant railroad corporation in its cross bill (fols. 15, 16 and 154 *et seq.*)

An appeal was taken to the Circuit Court of Appeals, resulting in an opinion rendered the 18th day of February, 1910 (fols. 18, 19, 20 and 193 *et seq.*). This was followed by the mandate of the Circuit Court of Appeal directing the Cir-

cuit Court to reverse the final decree of February 23, 1909, and remand the cause to the state court (see fol. 170 *et seq.*).

An order was thereupon entered upon the 28th day of February, 1910, by Judge RAY remanding the cause, but containing a provision that the order should not apply to the petitioning defendant, the Metropolitan Trust Company. See order fols. 166 *et seq.* and fol. 177.

The cause is now pending in the state court.

On the 21st of March, 1910, the defendant Metropolitan Trust Company, and its solicitors, were served with a notice of motion upon the affidavit of the complainant's solicitor, praying for an order vacating the judgment of January 10, 1908, and for an order remanding the cause to the state court as to the petitioning defendant (fols. 20, 178 *et seq.* and 183).

This motion was argued before the respondent, Judge WARD who granted the motion to vacate the decree; but suggested in his opinion and in the order that the motion to remand should be "denied without prejudice, upon the ground that an application for such relief should more properly be made to the judge of this court who entered the order herein to remand this cause as to all the other defendants" (fols. 223 and 233).

Judge WARD'S opinion and order are found at fols. 217 *et seq.* and 226 *et seq.*

In his return he refers to his opinion, as giving the reasons for his action. It contains the reasons for his granting the motion to vacate, but does not give his reasons for denying the motion to remand.

Without being authorized to state what his reasons were, three very good ones suggest themselves.

FIRST, Judge RAY should have remanded the whole cause in accordance with the mandate of the Circuit Court of Appeals, and hence application should be made now to him, to do what he should have done then;

SECOND, although the Metropolitan Trust Company was not before Judge RAY, yet it might be suggested, notwithstanding the wording of his order, that he had passed upon the question of remanding the cause as to the petitioning defendant, instead of merely refusing to pass upon it, and hence any action by another judge might possibly construed as overruling Judge RAY;

THIRD, any order which Judge RAY may now enter remanding the cause will rest both upon the vacation of the decree of January 10, 1908, and upon the mandate of the Circuit Court of Appeals, remanding the cause; whereas any order remanding the cause, made by Judge WARD, could not, as conclusively, be said to have been made, in accordance with that mandate (which was not addressed to him) but rather because of the vacation of the order of January 10, 1908.

Upon these facts the petitioning defendant has applied to this court, I contend erroneously, for a writ of prohibition or mandamus, to compel the vacation of the order of Judge WARD vacating the order of January 10, 1908, which sustained the demurrer of the petitioning defendant.

Judge WARD, in his return, refers to the proceedings recited in the exhibits annexed to the order to show cause, and especially to his opinion (fols. 217 *et seq.*), and to the opinion (written by him) in the Circuit Court of Appeals (fols. 194 *et seq.*) as giving his reasons for granting the motion.

It would seem that the important proposition of law which is before this court for determination is whether the Circuit Court retained sufficient jurisdiction over the cause of *Pollitz vs. The Wabash Railroad Company and others*, to entertain a motion, to set aside an order, entered at a preceding term, which sustained a demurrer as to one of the defendants, the motion being made at the same term wherein an order had been entered, in accordance with the mandate of the Circuit Court of Appeals, remanding the cause to the state court (as to all the necessary defendants) on the ground, that such diverse citizenship did not exist as to give the federal courts jurisdiction to take any proceedings, or to render any decrees in this cause.

If this question is answered in the negative, then it still remains to consider whether the petitioner has chosen its proper remedy in making its present application for a writ of prohibition or mandamus.

Errors in Petitioner's Brief.

It has been my privilege to read the brief submitted by the petitioner, upon its application for the order to show cause, and I have been informed by the petitioning defendant's counsel, that it contains the substance of his main brief on the return of the order to show cause. I believe that by pointing out two or three cardinal errors in Mr. McIlvaine's presentation of the matter, the issue will be clarified.

At the top of page 3 in the petition (fol. 14) and in the prayer at the foot of the petition (fol. 26) as well as in the brief, the order of January 10, 1908, is referred to as a "final decree"; and the petitioner complains that no appeal was ever

taken from this so-called final decree (petitioner's brief, p. 8).

Whether the order was a final decree or not, we believe that the motion below was properly granted.

But if it was not a final decree, and if no appeal could be taken from it, then necessarily the entire argument of the petitioner falls to the ground. Whereas, if the decree was a final one, from which an appeal could be taken, then it is incumbent on us to show, as we believe we can, that the motion below was an exception to the rule that a motion to set aside a judgment must be made at the term during which the judgment was entered. In other words, that it was in effect a motion in the nature of the ancient writ of *coram vobis*, or, as it was called in England, *coram nobis*.

The second cardinal error which permeates the entire brief of the petitioning defendant is that it was a necessary party to the action.

I have already pointed out, at the opening of this brief, that it was only a proper party. It has never been suggested by any of the counsel in this case, or by any of the judges before whom the cause has come in any form, that the Metropolitan Trust Company was a necessary party.

Judge LACOMBE held, in accordance with the contention of all the defendants and their counsel, that the Wabash Railroad Company was the only necessary defendant.

When the matter was before this Court (*in re Pollitz*, 206 U. S., 323), it was urged by Mr. Roger Foster on behalf of the complainant, that there were other necessary parties; but he contended, nowhere in his brief, that the Metropolitan Trust Company was one of these.

When the matter came before the Circuit Court of Appeals the present counsel of the complainant did not contend that the petitioner was a necessary party, and that court expressly held that the other defendants who were before it (the Metropolitan Trust Company was not one of these) were necessary parties because "the bill charged them, or some of them, with confederating to carry out an illegal agreement, *ultra vires* the company, for their own benefit," etc. (fol. 201).

The bill expressly excepted the Metropolitan Trust Company from this class of defendants (fol. 96).

The third cardinal error, which we find upon the petitioner's brief, is the false assumption that it is impossible to bring a party into court subsequent to a term, wherein a void or invalid judgment is entered, by a notice of motion; or, if we misunderstand Mr. McIlvaine's reasoning, and if he admits that there are cases when a party may be thus brought into court, to have a judgment entered in his favor vacated for want of jurisdiction, then, the error of our friends upon the other side is, in assuming that this case is not one of those cases in which a motion can perform the function of the ancient writ of error *coram vobis.*

The Nature and Character of the Complainant's Motion.

The issue is not one of nomenclature. As COWEN, J., said in *Smith vs. Kingsley,* 19 Wend., 620, 621, "we have lost the name of the writ, nothing more."

It matters little what the motion is called, and whether or not it falls exactly within the definition of the ancient writ referred to. That writ is defined to be one which can be issued at any term, sometimes years after a final decree, to vacate it,

because of the existence of some fact which shows that *the court did not have jurisdiction to render the decree*, such as that one of the defendants against which it was entered had died before judgment, or was an infant and was not represented by a guardian although represented by an attorney; or was a *femme covert* and her husband was not a party; or that there was misprision of the clerk, *or some like fact*, which existed and which robbed the court of its jurisdiction, or rather which showed that the court never had jurisdiction, and the judgment was void *ab initio*.

Before Blackstone's time this writ had been so generally superseded by a motion that it is not mentioned in his Commentaries. Both the motion and the writ were in use at a late day in New York; and this court has frequently discussed, and sustained cases, wherein the motion has been used in place of the writ.

In the case at bar we have a fact similar to those frequently relied upon, for the issuance of the ancient writ, and which, as conclusively, shows that the court had no jurisdiction.

The fact which the court then ignored (owing to the previous decision of Judge LACOMBE which was non-appealable and against which this court would not grant us relief) was, that diverse citizenship, as between the complainant and the necessary defendants, was lacking, and it was that fact alone which could give the jurisdiction to the federal court.

With this general statement of the facts, and of the nature of the plaintiff's motion below, we may proceed to a brief consideration of the authorities which we believe support the position taken by the learned judge below in addition to those recited in his opinion at folio 222.

POINT I.

This Court has no power to issue a writ of prohibition, in any case, except where the court below is proceeding as a Court of Admiralty.

None of the cases cited under Point III (a) of Mr. McIlvaine's brief negative this proposition.

The writ is now confined to Admiralty cases and never includes the prohibition of an act already completed. *Ex parte Christy,* 3 How., 292; *Ex parte Easton,* 95 U. S., 68, 72.

POINT II.

The writ of mandamus cannot be used to compel the Circuit Court, to take jurisdiction of a cause, which it has decided, through its Court of Appeals, it has no jurisdiction to consider, owing to a failure to show diverse citizenship, between the necessary parties.

This is practically what the petitioner demands.

A court has the right *ex mero motu* to refuse to consider a cause over which it has no jurisdiction, and similarly to vacate what it may have done in a cause over which it has no jurisdiction.

Its decision that there is not that diverse citizenship which gives it jurisdiction is final and will not be reviewed by this court.

The conclusion of the Circuit Court that the cause should be remanded is not reviewable here by appeal or writ of error or by mandamus, *In re Pennsylvania Co.,* 137 U. S., 451, 454; *Missouri Pac. R. R. vs. Fitzgerald,* 160 U. S., 556, 581.

A motion in the nature of a writ of errror

coram vobis "is the exercise of jurisdiction in the court below which does not admit of revision in this tribunal" *Ledgerwood vs. Pickets,* 15 Fed., Cas., 132; s. c., 1 McLean, 143; s. c., 7 Peters, 144, 148.

The petitioner is also endeavoring to make the writ of mandamus perform the office of a writ of error.

This court has emphatically held that this cannot be done "even if no appeal or writ of error is given by law" *In re Rice,* 155 U. S., 396, 403, citing *American Construction Company,* 148 U. S., 372, 379, *Ex parte Loring,* 94 U. S., 418.

The application seems also to contravene the rule sated in *Ex parte Newman,* 14 Wall., 152, where the court *held*:

> "Superior tribunals may by mandamus com-
> "mand an inferior tribunal to perform a legal
> "duty where there is no other remedy, and
> "the rule applies to judicial as well as to
> "ministerial acts; but it does not apply at all
> "to a judicial act to correct an error, as where
> "the act has been erroneously performed. If
> "the duty is unperformed and it be judicial
> "in its character, the mandate will be to the
> "judge, directing him to exercise his judicial
> "discretion or judgment, without any direct-
> "tion as to the manner in which it shall be
> "done, or if it be ministerial, the mandamus
> "will direct the specific act to be performed"
> citing *Carpenter vs. Bristol,* 21 Pick., 258; Angell & Ames on Corporations (9th Ed.), §720.

POINT III.

An order or decree sustaining the demurrer of one of several defendants, is not such a final decision, as gives the right of appeal to the complainant.

This must be so, especially when, as here, the demurring defendant is not a necessary party.

A final decision is one which determines all the issues between the complainants on the one hand and all the necessary defendants on the other.

The petitioner's counsel in all the moving papers refers to the order of January 10, 1900, as a final decree and complains that no appeal was ever taken from it.

It was not final, and it was not appealable. *In re Hohorst,* 148 U. S., 262; *In re Atlantic City R. R.,* 164 U. S., 633; *In re Pollitz,* 206 U. S., 323, 332; *Bostwick vs. Brinkerhoff,* 106 U. S., 3.

POINT IV.

The Metropolitan Trust Company was not a necessary party to the cause, although a proper party.

I have already pointed out that no one has claimed that it was a necessary party until the present motion, and I have given the reasons, *supra,* why it cannot be contended that it is anything more than a proper party. It is, perhaps, barely that. It was one of the general public who exchanged bonds and stock held by it for the new illegal bonds.

We cannot better state the impropriety of calling such parties who had no part in the confederacy of conspiring defendants "necessary parties" than by quoting from the brief of the counsel for

the defendants when before the Circuit Court of Appeals. After calling attention to the fact that the complainant is suing on behalf of the Wabash Railroad Company, and after stating the decree that might be entered in accordance with the prayer of the complainant's bill, counsel say:

> "Whatever effect, direct or collateral, the "rendering of such a decree would have upon "other security holders of the Wabash Rail-"road Company, is of no moment or concern "to the complainant. His rights are estab-"lished and full relief as to him secured. Any "controversy which might result or be created "as a consequence of such decree between the "Wabash Railroad Company and holders of "its other securities, is a separate and distinct "controversy, to which no party to the present "record, not even the complainant himself, "will be a necessary (or proper) party."

I believe the words I have placed in parentheses should be omitted to make the statement accurate.

The above statement of the status of the Metropolitan Trust Company and other innocent holders of the bonds, is not at all in conflict with the decision of the Circuit Court of Appeals that the other defendants (who were engaged in the conspiracy and actively taking steps towards its consummation) were necessary parties.

POINT V.

The Court may vacate a judgment, after the term has expired, during which it was entered, and its power so to do, is not dependent upon the issue of a formal writ, or the institution of an action in equity; but in a proper case relief can be obtained by service of a notice of motion.

Under this point, I do not propose to distinguish between those cases, where such a notice of motion is proper and those cases where it is not; but only to point to the fact that there is nothing inherently impossible in obtaining jurisdiction by such a notice, and that the jurisdiction of the court has frequently been exercised and upheld, without the formality of the service of a writ to bring the party who was successful in procuring the judgment into court.

Under my next point I shall endeavor to show, that the case at bar is one coming within the exception, and not within the general rule, that all such motions must be made before the close of the term during which the judgment is entered. It is sufficient here to cite the cases where this method of service has been utilized and held valid, after the expiration of the term.

I may be permitted also to suggest that the tendency of the courts is to simplify rather than to complicate practice. It would therefore seem as if that simplification of practice which began before Blackstone's time of substituting a simple notice of motion, in place of a writ, would warrant us, even if there were no precedent, in asking the court to enlarge, certainly not to limit, the cases where a notice of motion may take the place of a writ or a bill in equity.

We do not believe, however, that we are asking anything more, than that a notice of motion in the case at bar should perform its own recognized function of taking the place of a writ of error *coram vobis*.

The cases sustaining this point are all those cited under my next point and also the following: *Pickett vs. Ledgerwood*, 15 Fed. Cas., 132; s. c. 7 Pet., 142, 147; *Ferris vs. Douglass*, 20 Wend., 626; cited with approval in *Wetmore vs. Karrick*, 205 U. S., 141, 151.

POINT VI.

Whether the order of January 10, 1908, was final or interlocutory, and whether the Metropolitan Trust Company was a necessary, or only a proper party, no error was committed, by the Judge of the Circuit Court, in granting complainant's motion, to vacate that order, or decree, on the suggestion, or motion of complainant, in view of the mandate of the Circuit Court of Appeals, establishing the fact, that the diverse citizenship did not exist, which was necessary to give jurisdiction to the Court to enter the decree.

Nearly all that has been discussed and all the cases cited under the preceding point are applicable here.

The general rule is stated and recognized in Judge WARD'S opinion, that a motion to vacate a judgment must be made before the expiration of the term at which it was rendered (fol. 221).

But the exceptions to this rule are many. They include a judgment or order which is not final.

It would have been competent and proper for the court, or the defendants who entered upon the final judgment of February 23, 1909, in this case to have included the Metropolitan Trust Company in that judgment, as a proper, but not a necessary, party to the cause and to the judgment, and the Trust Company could not have objected that it had already been dismissed. It cannot now object that the court has lost jurisdiction over it.

But further:

THE ENTRY OF A VOID JUDGMENT DOES NOT DISMISS THE DEFENDANT FROM THE COURT; ONLY A VALID FINAL JUDGMENT CAN DO THAT. *City of Olney vs Harvey*, 50 Ill., 453.

MUCH LESS DOES THE ENTRY OF A VOID INTERLOCUTORY DECREE DISMISS A DEFENDANT.

But, assuming that the order of January 10, 1908, was a final judgment (although it allowed a number of defendants to answer) then it becomes necessary to consider the exceptions to the general rule.

Where a judgment is entirely void for want of jurisdiction the power to vacate it or set it aside is not limited to the term at which it was rendered, but may be exercised at any succeeding term. *U. S. vs. Wallace*, 46 Fed., 569.

See also 30 Cent. Dig. til Judgment, § 739, and Black on Judgments, § 307.

These exceptions include not only all cases which formerly could be included in the writ of error *coram vobis* (or as it is called in England and in the state courts *coram nobis, Ledgerwood vs. Pickets*, 1 McLean, 143, 144), but also many analogous ones. This has been emphatically and repeatedly held by this court, in all the cases cited by Judge WARD and upon this brief, and

especially in those cited under this and the preceding point.

The rule has been so well and concisely stated in one of the cases cited that we quote the opening paragraph in the opinion of Judge CLOPTON, in *Baker vs. Barclift*, 76 Ala., 414, 417:

> "It is a well settled principle that a Court "has no power to alter, vary or annul final "judgments, *not void*, after the expiration of "the term at which they were rendered, ex- "cept for the correction of clerical errors or "omissions, or to amend *nunc pro tunc* on the "record. It is also well settled, that when "a judgment, void for want of jurisdiction, "has been rendered, the court has the power, "and will, on a proper application, vacate such "judgment, at any time subsequent to its ren- "dition." Citing *Buchanan vs. Thomason*, 70 Ala., 401.

The ancient writ was used in cases where, like the case at bar, there was some fact which could be brought to the attention of the court by the writ, and which conclusively showed that *the court had no jurisdiction*, e. g., the death, infancy or coverture of a party, the misprison of the clerk, *"or the like."*

In the case at bar and in *Shuforth vs. Cain* 1 Abb. U. S., 302, cited by Judge WARD (fol. 222) the fact of a lack of diverse citizenship is the fact upon which the moving party relied to show lack of jurisdiction and the nullity of the judgment.

The only distinction between the cases is that in the case at bar the lack of jurisdiction of the cause has been passed upon and finally decided by the Circuit Court of Appeals, whereas in the *Shuforth* case [redacted] it had not.

This court *in re Hohorst*, 150 U. S., 653, issued a writ a mandamus to compel a circuit court to vacate an order dismissing a suit against one

of the defendants, and to resume jurisdiction over that defendant, although the order dismissing the bill was made on April 11, 1889, and the petition for the writ of mandamus was not made until May, 1893. Between these dates an appeal erroneously taken by the petitioner was dismissed, p. 664.

Thus judgment was vacated and a defendant who had been dismissed from the court was brought back without the issue of any writ against him and without any notice save a notice of motion.

This court in that case further held that the fact (if fact it was) that the defendant appeared specially to dispute the jurisdiction of the court did not alter the situation (p. 664).

In a case closely analogous to the case at bar, cited by Judge WARD in his opinion and frequently cited in the state courts (e. g., 1 Ariz., 334; 59 Md. 244; 11 R. I., 475; 58 Tex., 232) the learned court says:

> "It is insisted on the part of Shuford, that "no relief could be given in this particular "case upon a mere motion. But counsel did "not name what he deemed a proper remedy "though he seemed to indicate that a suit "*audita querela* or *scire facias* or a writ of "error *coram vobis*, might possibly answer. "The court will however leave the matter as it "stands and assume that a proceeding by mo- "tion is a suitable and also a not unusual "remedy.
>
> "*This mode of investigating questions which "are in their general features like these now "under consideration, has, in modern days "been countenanced and adopted by the "courts by reason of their being less expensive "and more simple and expeditious than these "cumberous and technically toilsome remedies "just named.*" Citing a number of federal and state court cases.

Shuforth vs Cain supra.

In that case the viciousness of a final judgment, and its consequent voidability, was shown on the moving papers to be the lack of jurisdiction. The alleged jurisdiction, as in the case at bar, grew out of an alleged diverse citizenship because the plaintiff was a citizen of one state and the maker, payee and endorser all citizens of another state. The motion was made several terms after that in which the final judgment was rendered.

I have been unable to find that this case has ever been criticised or overruled, and it has been frequently followed and cited with approval.

This court found no difficulty in the case of *Hoyt vs. Hammekin,* 14 How., 334, 346, invalidating the use of a notice of motion in lieu of a writ of error *coram vobis,* although that case did not fall within the specific defects of jurisdiction commonly named as those upon which that writ can be based.

Other cases, in addition to those already cited, which fall into the same class of cases, are: *Mills vs. Dickson,* 6 So. Car. Law Rep., 487; *Dederick's adm. vs. Richley,* 19 Wend., 108.

In one of these it was a judgment by confession, void because one partner could not confess for both.

In the other, the judgment was void because entered on a referee's report which, because the case was in tort, was unauthorized by the statute.

In the Rhode Island case, cited *infra,* there was a similar flaw in the jurisdiction.

The argument urged by the petitioner's counsel that the court cannot exercise jurisdiction after judgment did not prevail in this court in *ex parte Crenshaw,* 15 Pet., 119.

A motion there was made in the January term, 1841, to set aside a decree of this court, and although nothing was pending in this court, the cause had been concluded, the parties dismissed in the January term, 1840, and it was urged under the authority of *Lee vs. Dick,* 10 Pet., 482, that "the case has passed into judgment and is no longer before the court, or in the power of the court" this court by Chief Justice TANEY held that "since the cause was not legally before us at the "last term, the decree then pronounced must there-"fore be declared null and void and the mandate "to the circuit court must be revoked."

The case of *Wetmore vs. Karrich,* 205 U. S., 141, cited in petitioner's brief is not in point because there the motion was vacating the judgment was made and granted *ex parte.*

Another case cited by him and relied upon by us is that of *Phillips vs. Negley,* 2 Mackey (Md.) 248, S. C., 117 U. S., 665. There the cause for vacating the judgment was not the lack of jurisdiction and its consequent nullity, but "irregularity, fraud and deceit" (p. 666).

Among the cases cited by Judge WARD in addition to the leading cases in this court (*Bronson vs. Schulter,* 104 U. S., 401, and *Phillips vs. Negley,* 117 U. S., 665) and the *Shuforth* case already discussed, attention is called to the Rhode Island case (*In re College Street,* 11 R. I., 472), as presenting a state of facts showing lack of jurisdiction, but not falling within the specific cases ordinarily enumerated as subjects for a writ of error *coram vobis.*

It is urged by petitioner that our only remedy is to bring a bill in equity. This is circuitous, unnecessary, expensive, as is pointed out in the *Shuforth* case, quoted *supra.*

The bill in equity was found quite useless in an Ohio case.

There (*Critchfield vs. Porter*, 3 Ohio, 518, 522) the complainant was told that his simple, direct remedy to attack a judgment *void for lack of jurisdiction* was by motion, although the term had expired during which it was rendered, and, having that simple remedy, equity would not grant him relief.

FINALLY,

It is respectfully submitted, that the application for a writ of prohibition, and for a writ of mandamus, prayed for in the petition of the Metropolitan Trust Company, should be denied, with costs.

J. ASPINWALL HODGE,
Of Counsel for the Complainant in the cause of *Pollitz vs. Wabash Railroad Co.* and others, and designated, in the return in the above matter, to present the same, and to file such brief, and make such argument, as the court will permit.

Dated, May 10, 1910.
5 Nassau Street,
New York.